IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

CIVIL SECOND APPEAL No. 87 of 1987

CHIRANJEE LAL
V/S
NAND KISHORE & ORS.

Mr. RK PUROHIT for Mr. LR MEHTA, for the appellant / petitioner

None present for the respondent

Date of Order : 28.11.2006

HON'BLE SHRI N P GUPTA,J.

JUDGMENT

This second appeal has been filed by the defendant no. 1 against the judgment and decree of the learned Addl. District Judge No.1, Hanumangarh Camp Sangaria dt. 8.5.87, reversing the judgment and decree of the learned trial court, being Munsiff and Judicial Magistrate Ist Class, Sangaria dt. 29.8.1984, and thereby decreeing the plaintiff's suit for perpetual injunction, restraining the defendant from obstructing the plaintiff in using the staircase in question, and also directing, that if necessary the staircase may be repaired, expenses whereof shall be borne by both the parties 50:50.

The facts of the case are, that on 23.8.1981 the plaintiff filed the present suit against the appellant and two other defendants who are the brothers of the plaintiff and are proforma defendants, alleging interalia that shop

no. 90 in Dhanmandi, Sangaria fell to the share of the plaintiff in a family partition of the plaintiff, and shop no. 89 belongs to the present appellant. It was alleged that at the time of construction, the then owners of shop no. 89 and 90 constructed the joint party wall, and also constructed a 2 ft. 6 inch wide staircase for going upstairs, which was also constructed as a joint staircase, and on joint land. It is alleged that the staircase was being used by the ancestors of the plaintiff and the defendant no.1, and is being used now by the plaintiff and the defendant no.1, hereafter referred to as the defendant. It was then alleged that some 40 years back, when construction was raised on the first floor, the question arose about construction of the staircase for upper stories, and it was agreed between the parties, that the plaintiff should incur expenditure for construction, and in lieu thereof the owners of shop no. 90 shall become owner of the entire roof, and accordingly the plaintiff's ancestors constructed the staircase on upper stories, and on the roof, constructed store and also constructed another room including the roof, and since then the staircase is joint, and is being used without obstruction on the side of the defendant. It was alleged that the land lying in front of shop no. 90 was got allotted by the plaintiff and the defendants no. 2 and 3, and thereupon they raised construction on the ground floor, first floor, and the second floor, and also constructed a small staircase. It was then alleged, that for the last some time there is lack

of understanding between the parties, and the defendant is somehow or the other harassing the plaintiff, and in that process, six steps of the staircase were damaged by the defendant, on account of which the plaintiff is facing inconvenience in going upstairs, and the defendant is threatening to remove the remaining the stairs also. Interalia with these averments a suit has been filed claiming the relief of injunction restraining the defendant from demolishing the staircase, for mandatory injunction directing the defendant to repair the stairs damaged by him, restraining the defendant not to obstruct the user of the staircase by the plaintiff.

The defendant filed written statement on 7.9.1981. It was admitted that the wall between the two shops no. 89 and 90 was joint, and the staircase was also constructed jointly, but then staircase was never used by the plaintiff or his family members or by defendants no. 2 and 3, rather, when the shop was constructed only ground floor was constructed, and when both the parties raised construction over the first floor, at that time it was agreed that the owner of shop no. 89 alone would use the staircase, as utility of the staircase for the plaintiff had come to an end, and the plaintiff did not need that, as by then towards the west main market had come up, and it was not practicable for plaintiff and his family and children to use this staircase in question, and since then the plaintiff and defendants no. 2 and 3 have constructed a

separate staircase, and are using that and that the disputed staircase is in sole possession, control, use, and occupation of the defendant for the last more than 25 years, continuously, and without obstruction, electricity charges are paid by the defendant, and the management is being done by the defendant. Thus, the defendant has acquired adverse possession over the staircase, and that despite the plaintiff using staircase for certain period of time, thereafter by passage of long time the plaintiff has lost the right of reclaiming the right to use. It was denied that any agreement was entered into some 40 years back as alleged by the plaintiff, rather the first floor was constructed some 25 years back, and at that time the plaintiff's ancestors had relinquished their right in staircase in favour of the owners of shop no. 89. Then, the allegation about construction of store and terrace on the top floor was denied, and it was pleaded, that it was raised some 10 years back only, and the plaintiff has constructed other staircase, and that by raising construction on the top floor the plaintiff does not become owner of the staircase. Then, this very pleading about adverse possession, and relinquishment of right, was reiterated in different forms in different paragraphs of the additional pleas. It was pleaded that the land lying in front of shop no. 89 was also allotted to the defendant, and the owners have raised permanent construction, and at that time itself the plaintiff has constructed another staircase.

Various other pleadings were taken in additional pleas which need not detain me. The learned trial court framed various issues. However, crucial issues were issues no. 2, 3 and 6, inasmuch as, issue no. 2 was about the agreement having been entered into between the ancestors of owners of shop no. 89 and 90 some 40 years back, whereby the plaintiff was to construct staircase and in consideration thereof he was to get right of the top floor, while issue no. 3 was about the defendant having acquired adverse possession of the staircase, and issue no. 6 was about staircase being on the joint land, and continuing to be used by the plaintiff.

Learned trial court decided all these issues also against the plaintiff, and dismissed the suit. Regarding issue no. 2 it was found, that the plaintiff's evidence as produced is very vague, and is not reliable and it is also lacking material particulars. Then, deciding issue no. 3 it was found, that the site was inspected by the learned Presiding Officer on 17.8.1984, and it was found, that there is a door in existence opening in the north towards the plaintiff for plaintiff’s ingress and egress, and correspondingly there is a door on the upper end of the staircase also. It was also considered, that it is admitted by the defendant, that the staircase has been constructed on the joint land, but it was considered that admittedly the plaintiff has also constructed other staircase, and it

is the defendant alone who is maintaining the staircase, and paying electricity charges, and the plaintiff is not using the staircase for the last 25 years, and therefore, it was inferred, that the evidence of the defendant is more reliable, and it is more reliable version that the defendant has been using staircase for the last 12 years, and has acquired adverse possession. Obviously consequent upon finding on issues no. 3, issues no. 4, 5 and 6 were also decided against the plaintiff, and the suit has been dismissed.

In appeal, findings of learned trial court regarding issue no. 2 it was considered that since the plaintiff is using top floor even now, and the controversy is regarding staircase only, and therefore, it is not important, as to whether the staircase was reconstructed by the plaintiff or not, and thus the issue was left at that only, then deciding issues no. 3 and 6 together and rightly, it was found, that defendant also admits the possession of the plaintiff on the top floor, and it is established on record, that the plaintiff has constructed other staircase also, but then the defendant admits that this disputed staircase was constructed as a joint staircase by the ancestors of the plaintiff, and the defendant. Then, it has been considered that there is way available to the plaintiff for ingress and egress in the ground floor to upper stories also, and it is not established from the defendant's evidence that the

defendant has acquired adverse possession. Thus, the finding of the learned trial court was set aside. Then, considering the site inspection report prepared by the learned trial court, wherein it was mentioned, that there is a door on the upper side of the disputed staircase, measuring 36” x 76” opening towards the plaintiff, and other door measuring 34” x 75” opening towards the defendant, and likewise doors are also existing on the ground floor also, and it was also found, that steps which are said to have been damaged have already been restored, and thus the suit was decreed.

This appeal was admitted vide order dt. 14.9.1992 by framing following substantial question of law:-

> “Whether in the facts and circumstances of this case, plaintiff should have been compensated by award of money in lieu of injunction?”

I have heard learned counsel for the appellant. Nobody has appeared on behalf of the respondents, as Mr. Bhatnagar was called, who informs to be having no instructions.

Learned counsel for the appellant has assailed the impugned judgment of the learned lower Appellate Court by contending, that the learned lower Appellate Court was in error in reversing the finding of the learned trial court on question of defendant having acquired title in staircase

by adverse possession, as it is more than clear, that the appellant alone is using staircase for the last 25 years, and he is paying electricity charges, and he is maintaining the staircase, apart from the fact that the plaintiff has already constructed other staircase, and the suit has been filed only with a view to obstruct the appellant from raising a multi storey construction, for which the appellant needed to use the entire space of the staircase.

I have considered the submissions, and find, that apart from finding of the learned courts below one way of the other, the fact does remain, that the appellant himself has admitted, that the staircase in question was constructed by the ancestors of the owners of the shop no. 89 and 90 as a joint staircase, and exists on the joint land. In that view of the matter, the million dollar question is, as to how the right of the plaintiff, which admittedly existed, came to an end. In this regard, a look at the written statement shows, that the specific pleading taken by the defendant was, that at the time when the construction was raised on the first floor, at that time it was agreed between the owners of the two shops, that the staircase shall be used by the owners of shop no. 89 and his heirs only, and since by then main market had come up in the west, and therefore, looking to the location this staircase was not practicable to be used by the plaintiff's family members, and since then the plaintiff and defendants no. 2 and 3 constructed a separate staircase, and the

staircase in question is in sole possession, control use, and occupation of the defendant, for the last more than 25 years continuously, and un-obstructed. Thus, the defendant has come forward with a categoric case, about the plaintiff having given up his rights in the staircase, at the time of construction of the first floor, some 25 years back, and since then, the defendant is continuing in adverse possession. As against this, a look at the statement of D.W.1 defendant would show, that there is not an iota of evidence in this regard, viz. not a word has been deposed by the defendant, about any such agreement having been entered into between the ancestors of owners of shop no. 89 and 90. Not only that even in cross examination, on the other hand what has been deposed by the defendant is, that the top floor constructed, which has been raised some 25 years back, at that time, separate staircase was constructed, and this agreement relating the staircase was arrived at, at the time of raising of the construction on the top floor. Thus, it is clear, that the defendant has not led any evidence regarding the pleading as taken by him in the written statement, about plaintiff having given up his rights in staircase. That being the position, the only question remains is, as to whether the defendant has acquired title by adverse possession. In this regard also it would suffice to say that of course, the defendant has led evidence about solely using the staircase, and about plaintiff using his own separate staircase, but then there is no evidence whatever about the plaintiff having been

excluded from the user of the staircase. The “non user” and “exclusion” are obviously two independent things. On the other hand, it is clear on record, that there is a door available on the ground floor, for the plaintiff to enter the staircase. Likewise there is corresponding door on the upper end of the staircase again, for the plaintiff to approach the upper storey construction on shop no. 90. Had the story of plaintiff’s giving up his rights, or the defendant claiming adverse possession, were having any trace of truth, the two doors must have been closed, which is not the case of the defendant.

Thus, from the entire material on record, all that, at the best, can be said is, that the plaintiff had not been using the staircase for some length of time, as claimed by the defendant, so also that the plaintiff has constructed other staircase for approaching his property on the upper storey, but then, in my view, from that alone, it cannot be said, that the plaintiff has lost his right in the joint property, being staircase, which admittedly was constructed jointly, and thus I do not find any error in the findings recorded by the learned courts below.

So far as the substantial question of law, as framed, is concerned, suffice it to say, that nothing was submitted in this regard by the learned counsel.

The net result is that the appeal has no force, and is dismissed.

(N P GUPTA),J.